IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 26TH JULY 2007 / 4TH SRAVANA 1929

WA.No. 2348 of 2002(E)

AGAINST THE JUDGEMENT IN OP.37501/2001 Dated 10/07/2002
.....

APPELLANT/PETITIONER IN O.P:

M/S. HIGHWAY CONTRACTORS,
VYTTILA, REPRESENTED BY ITS PARTNER,
MR.JOSHUA KURUVILLA.

BY ADV. SRI.A.KUMAR

RESPONDENTS/RESPONDENTS:
---

1. SALES TAX OFFICER,
OFFICE OF THE DEPUTY COMMISSIONER,
COMMERCIAL TAXES, ERNAKULAM.

2. DEPUTY COMMISSIONER,
DEPARTMENT OF COMMERCIAL TAXES, ERNAKULAM.

3. THE COMMISSIONER OF COMMERCIAL TAXES,
OFFICE OF THE COMMERCIAL TAXES, TRIVANDRUM.

4. DEPUTY TAHSILDAR (R.R),
KANAYANNUR TALUK, ERNAKULAM.

5. THE STATE OF KERALA,
REPRESENTED BY FINANCE SECRETARY,
GOVERNMENT OF KERALA, THIRUVANANTHAPURAM.

BY SR.GOVERNMENT PLEADER MR.MOHAMMED RAFIQ

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 26/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

H.L.DATTU, C.J. & K.T.SANKARAN, J.

W.A.No.2348 of 2002

Dated, this the 26th day of July, 2007

JUDGMENT

H.L.Dattu, C.J.

This appeal arises out of an order passed by the learned Single Judge in O.P.No.37501 of 2001 dated 10th July, 2002.

(2) In the writ petition, the assessee had called in question the orders passed by the Sales Tax Officer imposing penalty under Section 10A of the Central Sales Tax Act, 1956 ('Act' for short). The learned Single Judge has rejected the writ petition filed by the assessee. That is how the assessee is before us in this writ appeal.

(3) The facts in brief are: The assessee is a dealer registered both under the provisions of the Kerala General Sales Tax Act and the Central Sales Tax Act. The assessee is a contractor. The assessee had gone before the registering authority for issuance of registration certificate. The assessing authority/competent authority had granted the registration certificate to the assessee. In the registration certificate it was made clear that the assessee can effect inter state purchase of goods for the purpose of resale.

(4) The Sales Tax Officer being of the opinion that the assessee has misused the C Forms, had initiated proceedings under Section 10A of the Act for imposition of penalty. In the show cause notice issued on 9.11.1998, the Sales Tax Officer had stated as under:

> "Please take notice that on verification of the C Form issue register and counter foils of C Forms it is noticed that you have effected purchase of goods like machinery, machinery spares etc., which are not been transferred for the execution of the works contract. The details are as under.
>
> xxx xxx xxx

> As you are a Works Contractor and the registration under the KGST Act and CST Act was granted accordingly, you are not a manufacturer. Therefore you are not entitled to the facility of using C Forms for the purchases of machinery, parts, Motor Parts etc., as mentioned earlier, as provided under section 8(3) of the CST Act 1956. As you have issued the C forms you are liable for penal action as provided Under Section 10A for violation of Section 8(3). Total amount of the purchase comes to Rs.180,25,936/-. It is therefore proposed to impose a penalty of Rs.27,03,890/- being 15% of the tax due on the value of the goods. Your objection if any against the proposal may be filed at 11 AM on 17.11.98 in my office at Ernakulam."

(5) After the receipt of the said show cause notice, the assessee had filed his detailed reply, inter alia, bringing to the notice of the Sales Tax Officer that the assessee was under the bona fide impression that he is entitled to issue C Forms. The assessee also had relied upon the observations made by the apex Court in the case of ***Builders Association of India and others*** v. ***Union of India and others*** [(1989) 73 STC 370]. The material portion of the objections filed by the assessee is as under:

> "We have mainly undertaking Re surfacing of the road and airport runway. We are using furnace oil, bitumin, metal and we are mixing the same in the plant. We have purchased Pavor Finisher, Drum Mix Plant from M/s.Gujarat Appolo Equipments Ltd. and Asphalt Pavor Finisher from M/s. Appolo Industries (P) Ltd. and Batching Plant from M/s.Bhai Sundardas etc, being the plant for this purpose. We are informed that we could buy this machinery by issue of C Form since these machineries are used for mixing/manufacturing of 'mix'. The Board in their Circular No.20/93 (Tax) dated 13/8/93 directed that C Form may be issued for works contractors. By a fiction of law the works contract is divided in to sale of goods and labour charges and as such after the 46th amendment the materials used in the execution of contract is deemed to be a sale. Supreme Court in Builders Association case (73 STC 370) and the subsequent decisions, the position has been made abundantly clear that by fiction of law the works contract stands the same hutting as that of any other dealer. The Judgment of Supreme Court in 73 STC on 31.3.89. We were under the

> bonafide impression that we are entitled to issue of C Form since we have followed the decision under the CST Act. The Board has issued circular on 2.1.97. In Para 13, the Board has given a direction that C Forms cannot be issued for the purchase of machinery. We may submit that we have purchased the issued C Form before 2.1.97.
>
> We may further submit that we have not issued C Form for purchase after 2.1.97. This also confirms bonafide and our information that we could issue C Form for purchase of machinery. Infact we have produced C Form register before the Officer previously and we put his signature in the register. We have issued C Form only after oral permission and clarification from Sales Tax Officer at the time of issue.
>
> We may also submit that in all these cases we have paid 4% tax on the purchases. Moreover out of the purchase the following materials are purchased and used in the contract."

(6) The Sales Tax Officer after considering the objections filed by the assessee has proceeded to pass an order imposing penalty in a sum of Rs.25,65,665/- by his order dated 30.1.1999.

(7) The first revisional authority modified the penalty imposed by the Sales Tax Officer by reducing it to a sum of Rs.10,26,300/- by its order dated 4.6.1999.

(8) The said order was questioned by the assessee before the second revisional authority. However, he was unsuccessful before the said authority. That is how the assessee was before this Court in O.P.No.37501 of 2001. The learned Single Judge has rejected the writ petition and that is how the assessee is before us in this writ appeal.

(9) We have heard Sri.A.Kumar, learned counsel appearing for the assessee and Sri.Mohammed Rafiq, learned Senior Government Pleader appearing for the Revenue. Both the learned counsel have taken us through several decisions of the various High Courts and also the Supreme Court. We

do not intend to refer to all those decisions, since we intend to remand the matter to the Sales Tax Officer to reconsider the whole issue once over again.

(10) Admittedly, a show cause notice had been issued to the assessee by the Sales Tax Officer before imposing penalty under Section 10A of the Act. The assessee had filed his detailed objections and in that he had specifically stated that the assessee was under the bona fide belief that he could issue C Forms for effecting inter state purchase of the machinery and building materials for the purpose of utilising the same in execution of the works contract. This reasonable excuse offered by the assessee should have been taken note of by the Sales Tax Officer and should have adverted to that aspect of the matter one way or the other. For imposing any penalty under clause (a), (b), (c) and (d) the guilty intention to evade tax is an essential ingredient of the offence. It is the case of the learned counsel for the department that the offence made out by the assessing authority would fall under clause (d) of Section 10 of the Act. In this clause, the Parliament has used the expression "without reasonable cause", that only implies blameworthy conduct is an essential requirement of the offence to fall under this clause. This fact has to be proved by the Sales Tax Officer and the authority has to record a finding thereon. This has not been done by the Sales Tax Officer. That only shows that there is total non application of mind by the Sales Tax Officer. Therefore, we cannot sustain the order passed by the Sales Tax Officer dated 30.1.1999.

(11) The aforesaid aspect of the matter should have been taken note of by the hierarchy of officers before whom the assessee had filed revision petitions. Even those revisional authorities have not noticed the specific contention canvassed by the assessee in so far as the bona fide impression

that the assessee was entertaining while effecting inter state purchase of the machinery and building materials for the purpose of execution of the works contract.

(12) In view of that even those orders passed by the hierarchy of officers before whom the revisions were filed by the assessee cannot also be sustained.

(13) Lastly, the learned Single Judge ought to have appreciated the aforesaid contentions canvassed by the assessee. But the learned Judge has indicated in the order that in a case of this nature no mens rea is need not be proved by the Sales Tax Officer. That view of the learned Single Judge may not be correct in view of the decisions of the apex Court in the cases of ***Hindustan Steel Limited*** v. ***State of Orissa*** [(1970) 25 STC 211] and ***Cement Marketing Co. of India Limited*** v. ***Assistant Commissioner of Sales Tax*** [(1980) 45 STC 197].

(14) Accordingly, the following:

Order

i) The writ appeal is allowed.

ii) The order passed by the learned Single Judge in O.P.No.37501 of 2001 dated 10th July, 2002 is set aside.

iii) The orders passed by the Sales Tax Officer and confirmed by the revisional authorities are also set aside and the matter is remanded back to the Sales Tax Officer to redo the matter in accordance with law after affording an opportunity of hearing to the assessee.

iv) The assessee is also at liberty to take up all such contentions which are available to him including certain contentions canvassed before this

Court.

Consequently, C.M.P.No.6176 of 2002 is dismissed.

Ordered accordingly.

(**H.L.DATTU)**
CHIEF JUSTICE

(K.T.SANKARAN)
JUDGE

vns/DK